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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL DAVID VOUSDEN, Defendant and Appellant.	H033046 H033475 (Monterey County Super. Ct. No. SS043246A)

Defendant Michael David Vousden appeals from a judgment of conviction entered after a jury found him guilty of 13 counts of grand theft (Pen. Code, § 487, subd. (a) - counts 1-13),[1] seven counts of forgery (§ 470, subd. (d) - counts 14-18, 20-21), one count of unauthorized insurance transactions (Ins. Code, § 700, subd. (b) - count 22), and 15 counts of failure to file a tax return with the intent to evade taxes (Rev. & Tax Code, § 19706 - counts 23-37).[2] In connection with counts 1 through 13, the jury found that the thefts exceeded a value of $100,000 (§ 1203.045, subd. (a)) and $150,000 (§ 12022.6). In connection with counts 14 through 18 and counts 20 and 21, the jury found that defendant

[1] All further statutory references are to the Penal Code unless otherwise stated.

[2] Defendant has also appealed from the order setting restitution at $3,837,145.82 in case No. H033475. This court has ordered that it will consider case Nos. H033046 and H033475 together for purposes of briefing, oral argument, and decision. Defendant has failed to raise any issues in case No. H033475, and thus, we dismiss his appeal from the restitution order.

committed multiple felonies involving fraud or embezzlement (§ 186.11, subd. (a)(2)). The trial court sentenced defendant to state prison for 14 years 4 months.

On appeal, defendant contends: (1) the trial court erred in instructing the jury on the defense of good faith; (2) the trial court erred in failing to instruct the jury on the lesser included offense of failure to file a tax return; and (3) there was insufficient evidence to support the forgery convictions and the grand theft convictions on counts 1 and 3. We conclude that there was insufficient evidence to support the forgery convictions. Accordingly, the judgment is reversed and the matter is remanded for resentencing.

I. Statement of Facts

A. Defendant's Companies

In December 1987, defendant formed an insurance company, Security Trust Insurance Limited (Security Trust), in the British Virgin Islands (BVI). In 1988, Security Trust took over another company's program that specialized in medical malpractice insurance for providers of obstetric and gynecological services. There were 17 policy holders in the program. At approximately the same time, defendant formed a second company, Protocol International, Inc. (Protocol), doing business as Accord. In order to purchase insurance from Security Trust, each clinic or physician was required to become a member of Protocol/Accord. Protocol also sold medical supplies to its members. According to defendant, Security Trust "was the association captive of Accord, the membership group."

In 1991, defendant formed STIL, Inc. to develop real estate. STIL, Inc. purchased a 32-acre parcel in Carmel Valley on which defendant intended to build a corporate retreat using funds that Security Trust lent to STIL, Inc.

In 1996, Security Trust insured approximately 20 to 25 clinics and its annual revenues were approximately $500,000. According to defendant, Security Trust had

between 10 to 15 reported incidents each year, and "[s]omething like 75 percent of them actually disappeared."

B. Revocation of Security Trust's License to Sell Insurance in the BVI

In 1997, the accounting firm for Security Trust expressed concern regarding the company's financial condition. On June 17, 1998, the Commissioner of Insurance in the BVI gave notice of its intent to cancel Security Trust's insurance license because the company had failed to file an annual audit. On July 29, 1998, defendant was also informed that the audited financial statements must be submitted prior to October 1998 and the July management accounts were to be submitted prior to August 15, 1998. At that time, defendant was in the BVI to assist in the completion of the audit. However, when defendant tried to return to the United States, he was denied entry due to a "red flag" on his visa and he returned to England. It took defendant five and a half months to resolve the matter and it was very difficult for him to conduct business from England. Consequently, he was unable to meet the deadlines for the audit of Security Trust.

On January 15, 1999, the Commissioner of Insurance informed defendant that the "Governor has ordered that Insurance License No. 95CA2 issued to Security Trust Insurance Limited is cancelled immediately. The insurance license issued for the period expiring on 31st December 1998 will not therefore be renewed by the Governor." The Commissioner of Insurance also ordered that Security Trust "must therefore cease to engage in or carry on any insurance business from within the Territory immediately upon receipt of this letter." The reasons for the cancellation were: "Failure to submit an audited financial statement pursuant to Section 22 of the Insurance Act of 1994. [¶] Failure to submit an appraisal of the property securing loans made by Security Trust Insurance Limited. [¶] Failure to submit a schedule of all loans made by Security Trust Insurance Limited. [¶] Failure to sign and return a copy of the letter dated 29 July 1998, setting out the terms under which Security Trust Insurance Limited may continue to

operate." The Commissioner of Insurance directed defendant in another letter to "commence and to conduct an orderly run-off of the company's business" prior to March 12, 1999.

Defendant appealed the cancellation of Security Trust's insurance license. According to defendant, two attorneys and a former insurance commissioner told him that the filing of the appeal stayed the action. Though the Commissioner of Insurance sent a letter stating that the filing of the appeal did not "in any way interfere with their powers under the act," defendant did not believe that this was true.

During this time, defendant was also having difficulty finding an auditor. According to defendant, the firms in the BVI were unavailable, and thus he began looking for an auditor in California in mid-1999. In June 2000, he contacted Chad Hoesing, a certified public accountant. However, the Commissioner of Insurance ignored requests to accept Hoesing as an auditor. John Carrington, a barrister in the BVI, was then retained to take over Security Trust's appeal, which had been filed by another law firm. Defendant also asked Carrington to write the Commissioner of Insurance regarding why there had been no response to the application for approval of the auditor. Carrington wrote on Security Trust's behalf two or three times, but did not recall receiving a response.

On October 6, 2000, the High Court of Justice found the cancellation of Security Trust's license to be "procedurally invalid." However, it made no factual determinations regarding the failure to meet the statutory requirements for maintaining an insurance license. The court stated that defendant had "been extremely delinquent over the years of its licensed existence with the submission of its annual accounts and financial statements required by section 22 of the [Insurance Act] to be submitted within three months of the end of the preceding financial year." The court ordered that Security Trust's applications for renewal of its license for the years 1999 and 2000 be submitted within 60 days, and

that "[u]pon failure to submit such applications, [the Governor] may take such steps as it sees fit pursuant to the Act."

On November 8, 2000, the Commissioner of Insurance informed defendant of the requirements for the renewal of the insurance license: "Your attention is also drawn to section 15(1) of the Insurance Act, 1994 which states that an insurer's license shall not be renewed unless the Governor is satisfied that the insurer's assets exceed its liability by at least the prescribed amount. We therefore expect that any application for renewal of Security Trust's license for a period after 31st December, 1998 will be supported by all information necessary to satisfy the Governor as required under this section having due regard to the aspects of the mentioned judgment of the High Court relevant to the manner of calculation of assets and liabilities for these purposes." Defendant was further reminded that "it is a contravention of section 11 of the Insurance Act, of 1994 to carry on insurance business in or from within the B.V.I. without holding a subsisting license. In light of this section, it is our view that unless and until Security Trust obtains a renewal of its license, it may not lawfully carry on any insurance business."

According to defendant, the "[c]ourt order didn't actually say that the audits needed to be included, it just said [he] had to make application for the license." On December 5, 2000, defendant sent a one paragraph letter to the Deputy Commissioner of Insurance in which he requested renewal of Security Trust's insurance license. Defendant did not provide any of the information previously requested by the Commissioner of Insurance.

On December 28, 2000, the Commissioner of Insurance informed defendant that his "request for a renewal of Security Trust's license . . . cannot be entertained in its current state as it does not meet the statutory requirements drawn to your attention in our letter to you of 8 November 2000." In response to defendant's claim that he had never received the November letter, the Commissioner of Insurance stated that the letter had been sent to Security Trust in care of its insurance manager in the BVI, who had

acknowledged its receipt, and the letter had been faxed to defendant. The Commissioner of Insurance also advised defendant: "In the circumstances, we do not consider that any proper application for a license renewal has been submitted to us. Further, we again draw to your attention that Security Trust currently has no license to do insurance business in or from within the British Virgin islands and would be in contravention of the law if it is doing such business. We must therefore insist that the company now refrain from doing any such business unless it obtains a valid license." According to defendant, it was his "feeling all along . . . that they were the ones not complying with the spirit of the court order where, in fact, it was very clear that they were supposed to cooperate with us and help us file the audit so we [could] bring everything up to date. In fact, all they were doing was obstructing us from being able to do that."

In November 2002, defendant was informed that Security Trust could no longer use the word "'insurance'" in its name. The company's name was then changed to Security Accord Limited.

C. Failure to Obtain License to Sell Insurance in California

The California Department of Insurance regulates and licenses liability insurance companies that do business in the state. There are three types of liability insurance companies that are licensed to operate in California: admitted insurers; surplus line insurers; and risk retention groups. An admitted insurer receives a license or certificate of authority from the state after meeting various statutory and regulatory requirements. One of the minimum requirements is $1,000,000 in capital and $1,000,000 in surplus. A surplus line insurer is licensed in at least one state or another country, but not in California. Surplus line insurers may only sell insurance in California after the Department of Insurance has placed it on the List of Eligible Surplus Line Insurers. One of the requirements for a surplus line insurer is that it can only transact insurance business through a licensed surplus line broker. The minimum capitalization level is

$15,000,000. A risk retention group lawfully operates in California pursuant to the federal Liability Insurance Risk Retention Act. These insurance companies are licensed in one state as a liability insurance company and operate in other states where they are registered to do business. There are also two foreign jurisdictions, Bermuda and the Cayman Islands, from which a company can be licensed and work as a risk retention group.

Federal law also authorizes the creation and operation of risk purchasing groups, which do not provide insurance. A risk purchasing group consists of policyholders who join together to purchase insurance from an admitted insurer, surplus line insurer, or risk retention group. This type of group may purchase insurance with a nonadmitted insurer through a surplus line broker.

At trial, defendant acknowledged that Security Trust was not an admitted insurer in California. In July 1988, defendant sent a letter to the California Department of Insurance in which he attempted to register Accord as a risk purchasing group. In response, the California Department of Insurance informed defendant that his letter "indicates that the group [would] purchase insurance from two insurers not admitted to do business in California." It further notified defendant that "all purchases for California purchasing group members made from an insurer not admitted to do business in the state must be effected through a licensed California surplus line broker having authority to export California risks to the nonadmitted market. Therefore, all of your placements for California purchasing group members must be made through a licensed California surplus line broker." Defendant was also requested to provide the "name of the licensed California surplus line broker which the group will use for purchases made by California purchasing group members." In November 1988, the Department of Insurer again advised defendant that "the licensed California surplus line broker is to be more than simply a conduit to allow the placement of coverage with nonadmitted insurers. Again,

only the surplus line broker may transact business in California with a nonadmitted insurer."

Defendant admitted that he did not transact business through a surplus line broker. Instead of relying on information provided by the Department of Insurance, defendant contacted the Surplus Line Brokers Association, which told him that "because [Security Trust] was the group's own association captive, that a surplus line broker was not needed." Based on this information, defendant concluded that he could proceed without a surplus line broker. He did concede, however, that the Liability Insurance Risk Retention Act did not include the terminology relating to "captive" or "captive groups."

At trial, the prosecution introduced a certificate from the California Department of Insurance attesting that Security Trust and Protocol/Accord "are not now or ever have been licensed by this Department to transact as an insurance business, as an insurer, or as an Eligible Surplus Line Insurer, or registered under the applicable State and Federal Risk Retention Acts, to act as a Risk Retention Group or a Risk Purchasing Group in the State of California and no application is now pending Furthermore, the above-named are not now or ever have been included in the Department's List of Eligible Surplus Line Companies." The prosecution also introduced a certificate from the California Department of Insurance attesting that defendant "is not now or ever has been licensed as a fire and casualty broker-agent, surplus line broker, life agent or registered administrator in the State of California, and no application is pending." Thus, according to Jill Jacobi, a staff attorney at the Department of Insurance, defendant could not lawfully sell medical malpractice insurance to people in other states from his place of business in Carmel and could not lawfully organize a risk purchasing group.

In the late 1990's, the Department of Insurance first investigated defendant when it received information from the BVI that Security Trust's license had been revoked and that the company was operating out of Carmel. An investigator, Anthony Cognacci, interviewed defendant in 1999, and the case was closed. However, the case was

eventually reopened and assigned to Michael Xavier. The investigators filed a report with the compliance bureau of the Department of Insurance and requested a cease and desist order to close Security Trust. After the legal division requested additional information, investigators were unable to make contact with Security Trust or defendant, though they made "several attempts of even staking out the former offices." Thus, they concluded that the business had been closed and no further action was taken by the compliance bureau.[3]

In the early 2000's, the Department of Insurance learned that Security Trust was continuing to sell insurance not only in California but also in other states. Investigators obtained a search warrant, which they executed on defendant's residence in April 2003. After interviewing defendant and reviewing his records, investigator David Fortman concluded that defendant "had stolen millions of dollars from his customers throughout California and the United States." According to Fortman, defendant was using the insurance premiums to support a "lavish lifestyle." Defendant used the premiums to purchase a painting for $250,000, and then spent another $200,000 to litigate its authenticity. Defendant also lent $1,600,000 of the insurance premiums to STIL, Inc. for the construction of a corporate retreat in Carmel Valley. Security Trust's loan was initially secured by a lien on the property. This property, which was encumbered by two liens, was Security Trust's sole asset. However, the loan was no longer secured by the property in July 2000. There were no cash reserves to pay insurance claims. In August 2004, the property went into foreclosure, and STIL, Inc. lost its equity.

During the search of defendant's residence, investigators found "piles" of letters in various locations. When Fortman asked whether he was going to pay these claims, defendant responded that they were "frivolous, bogus, or whatever word he used." Defendant also told Fortman that he was "avoiding" a $10,000 fine imposed by Nevada

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[3] Defendant testified that Security Trust was at the same location and had the same telephone number from 1999 through May 2001.

in 1999 for operating a business illegally. Fortman told defendant that his business appeared to be illegal and advised him to immediately cease and desist selling insurance.[4]

Defendant's licenses pursuant to the Insurance Act of 1994 from the BVI were seized from his house. These licenses expired on December 31, 1996, December 31, 1997, and December 31, 1998. After contacting the BVI authorities, it was confirmed that they had never issued subsequent licenses.

D. Counts 1 (Grand Theft), 14, and 15 (Forgery)

Jessica Knaster was the clinic administrator for Aradia Women's Health Center between 2002 and 2004. One of her responsibilities was to ensure that the clinic maintained medical malpractice insurance. Security Trust was the clinic's insurer.

On December 27, 2000, defendant sent a letter to Marcie Bloom, the executive director of the Aradia Women's Health Center, and stated that he "was pleased to inform [her] that Security Trust recently won the court appeal to re-instate our license." On January 25, 2001, defendant sent "documentation relating to the extension of your malpractice insurance coverage" through December 2001. On April 26, 2001, Security Trust issued a premium finance endorsement to the clinic for 2001. On August 7, 2001, Security Trust sent two certificates of insurance for Dr. Sarah Arnold and Dr. Sarah Philip, physicians who worked at the Aradia Women's Health Center in 2001.

Knaster recommended that the bills for insurance premiums be paid and she wrote some of the checks to pay the premiums. Knaster testified that she would not have recommended payment of the premiums if she had known Security Trust was not licensed, was not paying its bills, or was not a legitimate insurance company. According

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[4] Defendant denied that Fortman issued a cease and desist warning. According to defendant, Fortman stated several times that he "thought maybe [defendant] didn't have the right type of license, but he wasn't certain." Defendant told Fortman that he did not think he was committing any crime and he was going to carry on his business in exactly the same way.

to Knaster, Bloom told her to write the checks to Security Trust and approved renewal of the policies.

E. Counts 2, 4, 6, 7, 10, and 12 (Grand Theft)

Susan Hill was a partner in National Women's Health Organization (NWHO), which managed several women's health clinics. In 2001, NWHO operated six clinics: Central Florida Women's Health Organization; Delaware Women's Health Organization; Fargo Women's Health Organization; Jackson Women's Health Organization; Raleigh Women's Health Organization; and Summit Women's Health Organization. Hill first met defendant sometime in the mid-1990's. Shortly thereafter, NWHO obtained medical malpractice insurance from Security Trust. NWHO carried insurance with Security Trust for at least 10 years.

At some point, other clinic owners asked Hill whether she had received information concerning Security Trust's license from the BVI. NWHO contacted Security Trust and the BVI. The BVI did not respond, but defendant sent the organization a letter on April 12, 1999. Defendant explained that the problem was a "document filing anomaly" that led to Security Trust's annual audits not being filed in a timely manner. Defendant also stated that an appeal had been filed and the audited accounts would be filed by the time the appeal was heard. Hill felt reassured by the letter and renewed NWHO's insurance with Security Trust.

Hill received another letter, dated January 31, 2000, that stated Security Trust had appealed the refusal to renew its license, the appeal would be heard in three to six months, and its position was that English common law prevailed in this situation, thus staying any action. NWHO renewed its insurance with Security Trust. On December 27, 2000, Security Trust informed NWHO that it had won its appeal to reinstate its license. NWHO renewed its insurance in 2001 for all six clinics. NWHO also paid premiums to Security Trust until June 2002.

NWHO stopped renewing its insurance with Security Trust when Security Trust failed to pay a claim. After a patient died, her survivors brought a medical malpractice suit in 1999 against Delaware Women's Health Organization and Dr. Muhammad Imran. Dr. Imran was insured under one of NWHO's policies with Security Trust while the clinic was insured by another carrier. Hill advised the clinic's insurance carrier to settle the suit, which it did. However, defendant refused to settle on behalf of Dr. Imran, and the case went to trial. The jury awarded $2,000,000 in damages to the plaintiffs. Dr. Imran's share of the judgment was $800,000. Security Trust did not pay the judgment, and directed Dr. Imran to pursue an appeal. A series of attorneys represented Dr. Imran, but withdrew when Security Trust failed to pay them. After the judgment was upheld on appeal, Security Trust refused to pay it. Dr. Imran sold his home and other property to pay the judgment. He also paid $50,000 to $60,000 in attorney's fees. Dr. Imran brought suit against Security Trust and obtained a judgment of $1,668,921.90, but was unable to collect on it.

Dr. Imran also sued NWHO and alleged that it negligently obtained medical malpractice insurance from Security Trust. At the time of trial, NWHO had already spent $100,000 to defend this lawsuit. Hill testified that she would not have purchased malpractice insurance from Security Trust for NWHO if she had known that Security Trust's license was not renewed after 1998, it had no assets, and it could not pay its bills.

F. Counts 3 (Grand Theft), 16, and 17 (Forgery)

Shauna Heckert was the executive director of Women's Health Specialists, also known as the Chico Feminists Women's Health Center, which had four clinics. She purchased medical malpractice insurance from Security Trust for many years. During this time, the clinic had a couple of claims which Security Trust paid. After receiving some information that there might be a problem with Security Trust, Heckert spoke with defendant. He told her that all was well. In December 2000, she received a letter from

Security Trust, stating that it had won its appeal to reinstate its license. The clinic continued its insurance coverage with Security Trust through 2003, paying $80,000 to $100,000 per year. On February 18, 2002, Security Trust issued two certificates of insurance for Dr. M. Shelton Gross and Dr. S. Sella, physicians working at the clinics. Heckert stopped paying the insurance premiums after Security Trust "vanished," that is, stopped cashing the clinic's checks and answering the telephone. She also testified that if she had known that Security Trust was not licensed to do business, she would not have done business with them "without a further explanation."

G. Counts 9 (Grand Theft) and 20 (Forgery)

Dr. James Pendergraft, an obstetrician and gynecologist, opened the Orlando Women's Center in Florida in 1996. At that time he obtained medical malpractice insurance from Security Trust. Dr. Pendergraft later learned that Security Trust had a problem with its license. On December 27, 2000, defendant sent Dr. Pendergraft a letter stating that Security Trust had won its appeal to have its license reinstated. Dr. Pendergraft renewed the policy and received a certificate of insurance from Security Trust on January 15, 2001. Dr. Pendergraft also renewed his insurance policy for 2002 and 2003, and paid premiums of approximately $172,000 for the years 2001 through 2003.

Beginning in 2003, Security Trust failed to pay insurance claims submitted by Dr. Pendergraft. When a patient sued Dr. Pendergraft, defendant directed him to retain an attorney and go to trial. After a verdict was entered in favor of Dr. Pendergraft, Security Trust did not pay Dr. Pendergraft's attorneys. As a result, Dr. Pendergraft paid his attorneys $104,000. Security Trust also failed to pay $140,000 in attorney's fees in two other malpractice cases. Dr. Pendergraft would not have purchased insurance from Security Trust if he had known that it had no license after 2000, had limited assets, and was unable to pay claims.

H. Counts 11 (Grand Theft) and 21 (Forgery)

Dr. Martin Roitman, an obstetrician and gynecologist, worked for the Birth Control Care Center in Las Vegas. In 1995, he obtained medical malpractice insurance from Security Trust. Dr. Roitman paid the premiums for the policy.

In 1999, Dr. Roitman received a letter stating that there had been a problem with Security Trust's license, but that "everything was going to be okay." He later received a letter stating that Security Trust had won its appeal to reinstate its license. He then renewed his policy with Security Trust for 2001 and 2002. Dr. Roitman did not file a claim while he was insured by Security Trust. He testified that he would not have purchased insurance from Security Trust if he had known that it had lost its license in 2000, was not licensed in any state in the United States, and did not have sufficient assets to pay attorneys or claims.

I. Counts 5, 13 (Grand Theft), and 18 (Forgery)

In 1992, Deborah Walsh opened Family Reproductive Health Clinic in Charlotte, North Carolina. She later opened Volunteer Women's Medical Clinic in Knoxville, Tennessee. She purchased malpractice insurance for both clinics from Security Trust.

In March 1999, Walsh received a letter from the BVI, stating that Security Trust's insurance license had been canceled in December 1998. Defendant told her that "it was just technical things and that it was not a problem." He also assured her that her insurance coverage was still in effect. On December 2000, defendant informed Walsh that Security Trust had won its appeal. Both clinics renewed their insurance policies with Security Trust for 2001 and 2002.

In December 2002, Walsh canceled both policies because Security Trust failed to pay attorney's fees in two malpractice claims. In the first lawsuit, Security Trust paid $25,000 toward the settlement, but did not pay attorney's fees. Walsh paid $27,000 in attorney's fees. When Walsh sent the second claim to defendant, he was "not

responsive." Walsh paid $100,000 to settle the case and $23,875 in attorney's fees. Security Trust failed to pay anything. Walsh testified that she would not have purchased insurance from Security Trust if she had known in 2001 that it did not have an insurance license or any assets.

J. Count 8 (Grand Theft)

Nancy Atkins operated the New Woman Medical Center in Jackson, Mississippi. She purchased malpractice insurance from Security Trust in 1998. In 1999 or 2000, two malpractice lawsuits were brought against the clinic. Security Trust failed to pay the attorney's fees or the settlement of $10,000 in the first lawsuit. As to the second lawsuit, Atkins had no money to retain an attorney and suffered a default judgment of $500,000. Atkins then closed her clinic and declared bankruptcy. She would not have purchased insurance from Security Trust if she had known that it was not licensed after 2000, could not conduct insurance business after 2000, or could not pay its bills and claims.

K. Counts 23 through 37 (Failure to File an Income Tax Return)

Single California residents with an annual gross income over $12,500 are required to file an annual income tax return. Defendant failed to file individual tax returns in 1999 through 2004.

A corporation is required to file an annual income tax return until the date of its dissolution or withdrawal from the state. Regardless of income, corporations must pay an annual minimum tax of $800. Defendant failed to file corporate income tax returns on behalf of Protocol/Accord in 2000 through 2004 and on behalf of STIL, Inc. in 2000 through 2004.

According to defendant, he was not aware that the failure to file tax returns was a crime. It was his intent to pay the taxes when he had cash available to do so, though he

conceded that he would have paid taxes if he had known that he faced criminal prosecution.

II. Discussion

A. Jury Instructions

1. Defense of Good Faith

Defendant contends that the trial court erred in its instructions regarding the defense of good faith. He asserts that these instructions permitted the prosecution to carry its burden of proving that defendant did not act in good faith "simply by proving that [he] did not act in good faith in *some aspect* of his dealings with the victims—regardless of whether such conduct went to his sale of insurance to them."

"In a criminal case, a trial court has a duty to instruct the jury on '"'"the general principles of law relevant to the issues raised by the evidence."'"' [Citations.] The 'general principles of law governing the case' are those principles connected with the evidence and which are necessary for the jury's understanding of the case." (*People v. Estrada* (1995) 11 Cal.4th 568, 574.) "The trial court is charged with instructing upon every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citations.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.)

The specific intent to defraud is an element of both forgery and theft by false pretense. (*People v. Gaul-Alexander* (1995) 32 Cal.App.4th 735, 741 [forgery]; *People v. Shirley* (1978) 78 Cal.App.3d 424, 436 [theft by false pretense].) A defendant lacks intent to defraud when he acts in "'the good faith belief that his conduct was justified.' [Citation.]" (*People v. Webb* (1999) 74 Cal.App.4th 688, 694.) The burden is on the prosecution to prove that a defendant did not act in good faith. (*People v. Marsh* (1962) 58 Cal.2d 732, 736.)

Here, the trial court instructed the jury: "It is a defense to the crime of theft by false pretense and forgery if you find that the defendant acted in good faith *in doing business with the charged victims* between 12/12/2000 through 2004. [¶] In deciding whether or not the defendant acted in good faith, you may consider all the facts known to him at the time he made representations to the charged victims, along with all the other evidence in the case. The defendant may hold a belief in good faith even if the belief is mistaken or unreasonable. But if you find that the defendant was aware of facts that made that belief completely unreasonable, you may conclude that the belief was not held in good faith. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not act in good faith. If the People have not met this burden, you must find the defendant not guilty of the crimes charged in counts 1 through 21." (Italics added.)

The trial court also instructed the jury pursuant to CALCRIM No. 3406: "The defendant is not guilty of the crimes of grand theft and forgery, specified in the Information, if he did not have the specific intent required to commit those crimes because he did not know a fact or mistakenly believed a fact. [¶] If the defendant's conduct would have been lawful under the facts as he believed them to be, he did not commit the crimes of grand theft and forgery specified in the Information. [¶] If you have a reasonable doubt about whether the defendant had the specific intent required for grand theft and forgery you must find him not guilty of those crimes."

"Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677.) In considering the instructions as a whole, a reviewing court must determine " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380.)

Defendant points out that the prosecution introduced evidence that "Security Trust failed to pay its bills, failed to pay settlements and judgments, and failed to pay for the defense of suits against its insureds. . . . Security Trust [also] elected to go to trial against the wishes of its insured." Thus, he argues that "the jury could easily have concluded that [he] did not act in good faith 'in doing business with' the victims *even though* he had had a good faith belief Security Trust was authorized to sell insurance and a good faith belief it had sufficient assets to cover claims."

Here, the jury was instructed on the elements of both forgery (CALCRIM No. 1905)[5] and theft by false pretense (CALCRIM No. 1804).[6] As the trial court instructed, a defense to both offenses was a good faith belief that his conduct was justified. The conduct proscribed by these offenses did not include defendant's failure to pay bills, settlements, judgments or attorney's fees, or its management of cases. Thus, since the jury would have understood that the fraudulent collection of insurance

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[5] Pursuant to CALCRIM No. 1905, the trial court instructed the jury in relevant part: "To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant used a false or forged contract of insurance. [¶] Two, the defendant knew that the contract was false or forged. [¶] And, three, when the defendant used the contract, he intended that it be accepted as genuine, and he intended to defraud."

[6] Pursuant to CALCRIM No. 1804, the trial court instructed the jury in relevant part: "To prove that the defendant is guilty of this crime, the People must prove that: One, the defendant knowingly and intentionally deceived a property owner or the owner's agent by false or fraudulent representation or pretense. [¶] Two, the defendant did so intending to persuade the owner or the owner's agent to let the defendant take possession and ownership of the property. [¶] Three, the owner or the owner's agent let the defendant or another person take possession and ownership to have the property because the owner or the owner's agent relied on the representation or pretense. [¶] And four, when the defendant acted, he intended to deprive the owner of the property permanently or remove it from the owner or owner's agent's possession for so extended a period of time that the owner may be deprived of the major portion of the value or enjoyment of the property. [¶] You may not find the defendant guilty of this crime unless the People have proved that fal[se] pretense was accompanied by either a writing or false token, or there was a note or memorandum of the pretense signed or handwritten by the defendant."

premiums and the issuance of certificates of insurance and claims-made liability policies constituted the charges of grand theft by false pretense and forgery, it would have also concluded that these activities were the subject of the good faith instruction. Accordingly, it is not reasonably likely that the jury interpreted the challenged instruction in a manner that violated the Constitution.

2. Lesser Included Offense of Failure to File a Tax Return

Defendant also contends the trial court erred "by failing to instruct the jury on a violation of Revenue and Tax Code section 19701, subdivision (a) as a lesser included offense of a violation of Revenue and Tax Code section 19706."

Revenue and Tax Code section 19706 provides in relevant part: "Any person or any officer or employee of any corporation who, within the time required by or under the provisions of this part, willfully fails to file any return or to supply any information with intent to evade tax . . . is punishable by imprisonment in the county jail not to exceed one year, or in the state prison, or by fine of not more than twenty thousand dollars ($20,000), or by both the fine and imprisonment . . . ."

At the time of the charged offenses, former Revenue and Tax Code section 19701, subdivision (a), punished any person who "[w]ith or without intent to evade any requirement of Part 10 (commencing with Section 17001), Part 11 (commencing with Section 23001), or this part or any lawful requirement of the Franchise Tax Board, fails to file any return . . . ." (Stats. 1993, ch. 31, § 26.)

The trial court has a sua sponte duty to give jury instructions on the general principles of law that are relevant to the issues raised by the evidence even when the defendant has not made a formal request. (*People v. Blair* (2005) 36 Cal.4th 686, 744.) This duty encompasses "giving instructions on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present [citations], but not when there is no evidence that the offense was less than charged. [Citations.]" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) When the

trial court errs by failing to instruct on a lesser included offense, the judgment must be reversed if it is reasonably probable that the jury would have returned a different verdict absent the error. (*People v. Rogers* (2006) 39 Cal.4th 826, 868.)

The People acknowledge that, at the time of the charged offenses, misdemeanor failure to file a tax return (former Rev. & Tax Code, § 19701) was a lesser included offense of willful failure to file a tax return (Rev. & Tax Code, § 19706). (See *People v. Smith* (1984) 155 Cal.App.3d 1103, 1182-1183, disapproved on other grounds in *Baluyut v. Superior Court* (1996) 12 Cal.4th 826, 832-835.)

However, even assuming that the trial court erred in failing to instruct on the lesser included offense of misdemeanor failure to file a tax return, defendant has failed to establish prejudice. Defendant failed to file corporate tax returns on behalf of either Protocol/Accord or STIL, Inc. for five consecutive years and his individual state income tax returns for six consecutive years. Defendant made no effort to contact the Franchise Tax Board to arrange for payment of his back taxes. He received notices of his tax liabilities, but he did not believe that the failure to pay taxes was a crime. He claimed that he intended to "pay [the taxes] as soon as there was cash available to do so." However, he also conceded that he had sufficient funds and would have paid the taxes if he had realized that he faced criminal prosecution. This is compelling evidence that defendant failed to file tax returns with the intent to evade payment of taxes. Despite defendant's testimony that he did not intend to evade payment of taxes, it is not reasonably probable that the jury would have found defendant guilty of the lesser included offense absent the instructional error.

B. Sufficiency of the Evidence

Defendant also contends that there was insufficient evidence to support his convictions for grand theft by false pretense as charged in counts 1 and 3, and forgery as

charged in counts 14 through 18, 20, and 21. He further argues that his convictions on these counts violate his due process rights.

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Jones* (1990) 51 Cal.3d 294, 314.) We review "the evidence in the light most favorable to the prosecution, and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Griffin* (2004) 33 Cal.4th 1015, 1028.)

1. Grand Theft Convictions - Counts 1 and 3

In order to be found guilty of grand theft by false pretense, the evidence must establish: "'(1) that the defendant made a false pretense or representation, (2) . . . with the intent to defraud the owner of his property, and (3) that the owner was in fact defrauded in that he parted with his property in reliance upon the representation.' [Citations.]" (*People v. Whight* (1995) 36 Cal.App.4th 1143, 1151.)

Regarding count 1, defendant argues that there was no evidence that the person who made the decision to purchase insurance from Security Trust relied on any misrepresentations by defendant.

Bloom, the executive director of Aradia Women's Health Center, did not testify. According to Knaster, the clinic administrator, Bloom approved the renewal of the policies with Security Trust and told her to write the checks to the company. In December 2000, defendant sent Bloom a letter, which stated in relevant part: "Further to previous correspondence regarding our licensing situation, we are pleased to inform you that Security Trust recently won the court appeal to re-instate our license." This document establishes that Bloom had contacted defendant because she was concerned that Security Trust was unlicensed, and that defendant falsely represented that it was. The jury could reasonably infer that Bloom relied on defendant's false representation as to the licensing status of Security Trust when she decided to renew the policy with the

company and directed Knaster to pay the premiums. Thus, there was substantial evidence to support defendant's conviction of grand theft in count 1.

Defendant argues, however, that the letter is not a misrepresentation. We disagree. Though defendant correctly stated that Security Trust had won its appeal, the statement implies that Security Trust's license had been reinstated. Since the license had not been reinstated, defendant misrepresented the status of Security Trust's license. Defendant also claims that there was no evidence that Bloom had read the letter. Given that the letter indicates that there had been "previous correspondence regarding [Security Trust's] licensing situation" and that the premiums were paid to Security Trust, one can reasonably infer that Bloom read the letter before directing Knaster to pay the premiums.

Regarding count 3, defendant contends that there was insufficient evidence that Heckert would not have purchased insurance from Security Trust if she had known that it had lost its license.

At trial, the following colloquy occurred between the prosecutor and Heckert: "Q. If you had known that Security Trust Insurance Limited lost its license . . . in the British Virgin Islands as of the end of 2002, could no longer be legally engaged in the insurance business, would you have continued to do business with them? [¶] A. Not without further explanation of what that meant. I'm not at all an authority on insurance law, so I have to depend on others for that; like my insurance broker, my insurance company itself, and sometimes my own attorneys. [¶] . . . [¶] Q. Would you have done business with them if you had known the company was not licensed to do business anywhere in the United States? [¶] A. Not without a further explanation. . . . . So I really have to depend on others to give me that kind of legal analysis over what it is."

This testimony establishes that Heckert would not have continued to do business with Security Trust unless her legal advisors informed her that it was an appropriate action to take. The jury could have reasonably inferred that none of these advisors would have recommended that she purchase insurance premiums from a company that was not

licensed to do business either in the BVI or the United States. Accordingly, there was sufficient evidence that Heckert relied on the information provided by defendant in purchasing insurance from Security Trust.

Defendant also argues that Heckert did not feel that defendant had defrauded her. This evidence is irrelevant to the element of reliance. A "person is defrauded of his property when he is induced to part therewith by false pretenses and the crime is complete when, by means of such false pretenses, the fraud thereby intended is consummated by obtaining possession of the property sought. [Citation.] . . . As additionally observed in *People v. Talbott*, 65 Cal.App.2d 654, 659: 'The victim is merely a witness whose ultimate financial gain or loss, in the circumstances, is immaterial. Financial loss is not a necessary element of the crime.'" (*People v. Andrews* (1958) 165 Cal.App.2d 626, 639.) Thus, this portion of Heckert's testimony has no bearing on our consideration of the sufficiency of the evidence to support a conviction as to count 3.

2. Forgery Convictions - Counts 14-18, 20, and 21

The jury convicted defendant of seven counts of issuing forged contracts. Defendant contends that "the acts alleged and proved to support the forgery counts do not constitute the crime of forgery."

Section 470, subdivision (d) states in relevant part: "Every person who, with the intent to defraud, falsely makes, alters, forges, or counterfeits, utters, publishes, passes or attempts or offers to pass, as true and genuine, any of the following items, knowing the same to be false, altered, forged, and counterfeited, is guilty of forgery: any . . . contract . . . ."

The prosecutor introduced five certificates of insurance and two claims-made liability policies. Relying on evidence that defendant was not authorized to sell insurance, the People argue that defendant forged these documents.

The present case is governed by *People v. Bendit* (1896) 111 Cal. 274 (*Bendit*). In *Bendit*, one company owed money to another company. The defendant, who had no authority to do so, sent a document on behalf of the creditor to the debtor to allow the debtor to examine it prior to making payment. The defendant then went to the debtor, collected the money that was owed to the creditor, and signed the creditor's name to a receipt followed by his own initials. (*Bendit*, at p. 276.) The California Supreme Court concluded that the defendant's conduct did not constitute forgery within the meaning of section 470, stating: "When the crime is charged to be the false making of a writing, there must be the making of a writing which falsely *purports to be the writing of another*. The falsity must be in the writing itself—in the manuscript. A false statement of fact in the body of the instrument, or a false assertion of authority to write another's name, or to sign his name as agent, by which a person is deceived and defrauded, is not forgery. There must be a design to pass as the genuine writing of another person that which is not the writing of such person. The instrument must fraudulently purport to be what it is not." (*Bendit*, at pp. 276-277.)

Though section 470 has been amended to include the signing of an instrument without the authority to do so, the People concede that *Bendit* continues to stand for the "'broader proposition that a false statement of fact in the body of the instrument cannot be a forgery.'" As one commentator has explained: "When the charge consists of a false making of a writing, there must be the making of a writing that *falsely purports to be the writing of another*. A *false statement of fact* in the body of an instrument is not forgery, but may constitute false pretenses [citation]. Put another way, forgery directly implicates the writing itself, not the oral or implied misstatements about the writing. [Citations.]" (2 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Crimes Against Property, § 149, p. 181.)

Here, defendant prepared and sent certificates of insurance and claims-made professional liability policies to the victims. These documents did not fraudulently

purport to be what they were not. Nor did they purport to be the writing of another. Instead, they were exactly what they appeared to be, that is, certificates of insurance and policies issued by Security Trust. That defendant falsely asserted that he was authorized to sell insurance did not constitute forgery. As in *Bendit*, there was no falsity in the writing itself. (*Bendit, supra*, 111 Cal. at p. 277.) Accordingly, there was insufficient evidence to establish that defendant forged these documents.

C. Section 4019

Defendant also argues that he is entitled to additional conduct credits pursuant to the recently amended section 4019. We disagree.

The First District Court of Appeal has held that the amendment to section 4019 applies retroactively. (*People v. Norton* (2010) 184 Cal.App.4th 408.) However, this court and the Fourth District Court of Appeal have held that the amendment is not retroactive. (*People v. Hopkins* (2010) 184 Cal.App.4th 615.) We agree with the reasoning in *Hopkins* and reject defendant's contention that he is entitled to additional conduct credit.

III. Disposition

The judgment is reversed and the matter is remanded for resentencing. The appeal in case No. H033475 is dismissed.

_____
Mihara, J.

I CONCUR:

_____
Bamattre-Manoukian, Acting P. J.

McAdams, J., Concurring and Dissenting.

I concur in the judgment, as modified, in all respects but one.

I dissent on the issue of additional conduct credits under the 2009 amendments to Penal Code section 4019. I agree with the reasoning of the numerous cases that have held the amendments apply retroactively, including, most recently, *People v. Keating* (2010) 185 Cal.App.4th 364.[1] In my view, such a conclusion follows from California Supreme Court precedent. As the Court reiterated in *People v. Nasalga* (1996) 12 Cal.4th 784, "provisions of a statute that have an ameliorative effect must be given retroactive effect, even where other provisions of the same statute clearly do not have such an effect." (*Id.*, at p. 796, following *People v. Estrada* (1965) 63 Cal.2d 740.) I would therefore find the amendments to Penal Code section 4019 at issue here apply retroactively.

_____

McAdams, J.

[1] The California Supreme Court has recently granted review in several cases involving this issue, including those which have found the statute applies retroactively (*People v. Brown*, S181963; *People v. House*, S182813; *People v. Landon*, S182808) and one which has found it applies prospectively only. (*People v. Rodriguez*, S181808.) Several more petitions for review are pending.